In the United States

Circuit Court of Appeals

for the Ninth Circuit

JOE DUKICH,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 4149

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

The defendant Joe Dukich was charged by information, in two counts, with violations of the National Prohibition Act. The first count charged defendant with the possession of about one pint of intoxicating liquor, on October 10, 1923; and the second count charged him with selling on the same day a quantity of spiritous liquor to one Leonard Regan. He was found guilty by the jury on both counts, and sentenced to pay a fine of $500 and to serve six months in the county jail.

Both counts charged the defendant directly, no person being charged jointly with him, and it not being charged that he acted by or through the agency of another person.

The testimony of the Government was by two federal prohibition agents, Regan and Edholm. Regan testified that he went to the soft drink place of the defendant at about 10 P. M. October 9th, with Edholm and a man whom they had "picked up" on the street; that the man spoke to the defendant, who followed them in, and that the bartender served them two drinks.

An objection was made to this testimony upon the ground that it was a variance from the allegations in the information; that it was not alleged therein that the defendant acted through the agency of another, and no notice was given him of the nature of the accusation against him. This objection was overruled by the court, with the privilege of renewing it at the close of the case (pp. 36-37). It was so renewed by motions to strike and was overruled, and exception taken (pp. 38-49-50).

The witness proceeded in his testimony to relate that the bartender served the witness, Edholm and the man accompanying them three drinks, for which Regan paid, the bartender ringing the money up in the till.

Further, that he (Regan) and Edholm came back on July 10, the defendant being behind the cigar counter, and that the bartender served the witness two drinks of moonshine, the money paid therefor being rung up by him in the cash register (p. 37).

They returned at 10 P. M. and purchased a drink of moonshine whiskey from the bartender, whose name was Martin, and asked him for a pint of liquor. He sent a man to the rear to get it, and when the man was gone Edholm bought a drink of moonshine whiskey from the bartender. The man came back, handed the bottle to the bartender, who gave it to Regan. Regan paid him, the money being rung up in the till.

An objection to the admission of the bottle on the previously stated grounds that no agency or relationship was charged in the information, and that the evidence constituted a variance was overruled by the court.

On cross-examination the witness stated that when he went in the first time he did not ask defendant for a drink, the first thing said as to a drink being addressed to the bartender, the defendant being behind the cigar counter. (R. 42). On the second visit the defendant was talking to some foreigners, and the only thing said as between them

was "Hello." The third time the same thing took place.

So that the testimony of Regan shows no participation by the defendant in the act of selling liquor to them or even knowledge on his part that they had made purchases from the bartender.

On cross-examation of Edholm the same is true and as he locates the bartender as about the middle of the bar, and the defendant as behind the cigar counter, estimating the bar to be twenty feet and the cigar counter seven or ten feet.

The situation then is that the information charged the defendant with possession of a pint of liquor and with the sale of intoxicating liquor, and all that was shown were acts upon the part of the bartender in his place, and no participation of the defendant in such acts, or even a showing that he knew of the particular sales being made by the bartender to the witness Regan.

SPECIFICATIONS OF ERROR.

I.

The court erred in overruling the demurrer to Count 1 of the information.

II.

That the court erred in refusing to strike the evi-

dence relating to the sales of intoxicating liquor by one Martin for the reason that the information charged a sale by the defendant and did not name or otherwise refer to the said Martin, and such evidence constituted a fatal variance from the information, and the information did not apprise defendant of the nature and cause of the accusation against him. (Assignment of Error IV, pp. 21-22.)

III.

That the court erred in denying the motion to strike the evidence relating to the possession of a pint of moonshine whiskey by the said Martin, or others, for the reason that the information charged possession by the defendant and did not refer to the said Martin or others, and that this evidence constituted a fatal variance from the information, and the information did not inform defendant of the nature and cause of the accusation against him. (Assignment of Error V, p. 22.)

IV.

The court erred in denying the motion of the defendant for a directed verdict of not guilty as to the first count of the information.

V.

The court erred in instructing the jury as follows:

"* * ** and in this case I instruct you that if you find from the evidence that upon the occasion in question the bartender referred to by the name of Martin was the agent or the employee of the defendant Dukich, and that that man, with the knowledge of Mr. Dukich, had in his possession at that place the intoxicating liquor in question, that, in law, would amount to the possession of Mr. Dukich."

VI.

The court erred in instructing the jury as follows:

"* * * In this connection I further instruct you that if you find that at the time and upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender and called Martin, and that the sale of this liquor was made by Martin, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counseled, commanded, induced or procured the bartender known as Martin so to sell the liquor, that in law would constitute Mr. Dukich a principal in that transaction and he would be equally guilty with the man Martin who actually carried on and conducted the sale."

VII.

The court erred in instructing the jury as follows:

"If you find from the evidence beyond all reasonable doubt that at the time and on the occasion referred to in the evidence that Martin was the agent or employee of the de-

fendant Dukich, and that upon the time and occasion referred to in the evidence the bartender known as Martin had in his possession intoxicating liquors, that is, liquors suitable for beverage purposes and containing more than one-half of one per centum of alcohol by volume, and that the defendant Dukich knew of the possession of that liquor by his agent or employe, then you should find the defendant guilty of the offense of the possession of intoxicating liquor."

VIII.

The court erred in instructing the jury as follows:

"If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan the intoxicating liquor referred to in the evidence, and that at the time of such transaction the defendant Dukich was present and aided, abetted, counseled, advised or participated in the transaction, your verdict should be guilty."

IX.

That the court erred in denying the motion of defendant in arrest of judgment.

X.

That the court erred in denying defendant's petition to set aside the verdict and for a new trial.

ARGUMENT AND AUTHORITIES.

The Court Erred in Overruling the Demurrer to Count 1. (Specification I.)

Count 1 of the information charges that the defendant:

> "* * * On or about the 10th day of July, 1923, in the said county of Spokane, in the Northern Division of the Eastern District of Washington, and within the jurisdiction of this court, did then and there knowingly, wilfully and unlawfully have and possess certain intoxicating liquor, to-wit: about one (1) pint of a certain spiritous liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

The demurrer to this count should have been sustained for the reason that it fails to allege any facts to show that the possession was unlawful. It is not unlawful under Sec. 3 of the National Prohibition Act to possess liquors in one's private dwelling for use of the owner and his guests. Here the place where the defendant possessed the liquor is not stated, nor is the purpose for which he possessed it alleged.

In *U. S. v. Cleveland,* 281 F. 249, the court in considering a similar count said, on p. 252:

"We find here an express recognition of the right to have and consume liquors in one's home. Notice that in the two sections forbidding the possession of liquors the language is qualified. In Section 3, 'Or possess any intoxicating liquor except as authorized in this act'; while in Section 33 it is, 'The possession of liquors by any person not legally authorized * * * shall be *prima facie* evidence,' etc.

'So the possession of liquors in the home is both 'authorized' and 'permitted" by the act, and so is its use there as an intoxicating beverage' for Section 33 says:

" 'Provided such liquors are for use only for the personal consumption of the owner thereof and his family,' etc.

"In the face of this provision is it sufficient to allege the indictment, as here, merely the possession of the liquor by defendant and his intended use thereof as a beverage?"

The court then goes on to construe Section 32, providing that the indictment need not contain defensive negative averments, saying that this section goes on to provide:

" 'But it shall be sufficient to state that the act complained of was *then and there* prohibited and unlawful.' "

Says the Court:

"What was meant by 'then and there,' unless it was the time and place when the liquor was possessed by defendant? Must not the indictment then state this time and place? If so, this would not be a negative or defensive averment, but a positive one. As long as the act recognizes the right of possession and use at

certain places, and makes such possession illegal only at other places, then an indictment, to be sufficient, should state a time and place where the possession was illegal."

In *U. S. v. Illig*, 288 F. 949, the court on page 945 said:

"The various counts of the information are also defective in failing to set forth the ingredients of which the several offenses are composed, the several elements that enter into them, that the defendant may be informed of the precise offense which he is called upon to meet, and be enabled to subsequently interpose a plea of former acquittal or conviction. In most of the counts, which I will not stop to severally consider, the averments are merely conclusions of the pleader rather than averments of fact constituting a violation of the federal statute.

"As an example: The first count charges that the defendant 'did wilfully and unlawfully have and possess a large quantity (stating the amount) of intoxicating liquor without being authorized so to do in the manner provided by the National Prohibition Act.' The count could scarcely be drawn more barren of facts. Nothing is averred as to the character of the defendant's business, where the liquors were found or possessed, the purpose of their possession, or in what way the possession was unlawful. The pleader wholly ignores the fact that possession of intoxicating liquors is not made an offense under the Eighteenth Amendment; that Congress did not make the mere possession, stripped of every other fact, a crime. Possession can be made an offense only when prohibited for the purpose of making effective that which the amendment prohibits. But Congress cannot do so for the purpose of adding a prohibited act to those prescribed in

the fundamental law. *Hilt et al. v. U. S.* (C. C. A.), 279 Fed. 421; *U. S. v. Beiner* (D. C.). 275 Fed. 704; *U. S. v. Dowling* (D. C.), 278 Fed. 636; *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. 151, 10 A. L. R. 1548."

In *U. S. v. Boasberg*, 283 F. 305, the court on page 212 said:

"This leaves counts 4 and 5 of the second indictment to be considered. While the National Prohibition Act makes possession of intoxicating liquor for beverage purposes generally unlawful, Section 33 of title 2 of the act contains the proviso that it shall not be unlawful to possess liquors in one's private dwelling for the use of himself, his family and bona fide guests.

"The said two counts do not negative this proviso in any way. It is not enough to say this is a matter of defense to be raised by the defendant. Unless the exception is negatived or the allegations of the indictment clearly show the liquor to be possessed at a place not the defendant's residence, no offense is charged. *U. S. v. Cook*, 17 Wall. 168, 21 L. Ed. 538."

In *Boasberg v. United States*, 279 F. 421, the Circuit Court of Appeals for the Fifth Circuit said, page 422:

"Neither of the counts mentioned states any fact or facts showing that the alleged possession was accompanied by such a purpose or intent, or was under such circumstances as to render it a violation of any law. The facts averred are consistent with the alleged possession of intoxicating liquors being a legally permitted one. The averments do not show that

> the conduct charged had the elements required to make it a crime against the United States."

See also *U. S. v. Dowling*, 278 F. 630.

The above cases call attention to the rule laid down in *Keck v. U. S.*, 172 U. S. 434, 43 L. Ed. 505, that the words "contrary to law," "unlawful," etc., add nothing to an indictment. There Chief Justice White said:

> "It was charged in the count that Keck, on the date named, 'did knowingly, wilfully and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to-wit., into the port of Philadelphia,' contrary to law and to the provisions of the act of Congress in such a case made and provided, with intent to defraud the United States.' "
>
> "As is apparent, the alleged offense averred in this count was charged substantially in the words of the statute. In the argument at bar counsel for the United States conceded the vagueness of the accusation thus made; and, tested by the principles laid down in *United States v. Carll*, 105 U. S. 611, 612 (26:1135); *United States v. Hesse*, 124 U. S. 483 (31: 516); and *Evans v. United States*, 153 U. S. 584, 587 (38:830, 832), the count was clearly insufficient. The allegations of the count were obviously too general, and did not sufficiently inform the defendant of the nature of the accusation against him. The words, "contrary to law," contained in the statute clearly relate to legal provisions not found in Section 3082 itself, but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the

importation of merchandise. The general expression, 'import and bring into the United States,' did not convey the necessary information, because importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific statutory requirements. As said in the Hess Case, at page 486 (31:517):

> " 'The statute upon which the indictment is founded only described the general nature of the offense prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, state no matters upon which issue could be formed for submission to a jury.' "

The Court Erred in Refusing to Strike Testimony Relating to Possession and Sales of Liquor by the Bartender Martin. (Specifications of Error IV and V.)

The information charging defendant directly with the possession and sale of intoxicating liquor, timely objections were made to the introduction of evidence to show possession and sale by the bartender. These objections were overruled with the privilege of renewing them at the close of the Government's case, which was done by motions to strike. Exceptions were also taken to the instructions of the court allowing the jury to find the defendant guilty of possession and sale by Martin.

The ruling of the court was based upon the decision of the Circuit Court of Appeals for the Ninth Circuit, in *Rosencranz v. United States*, 155 Fed.

38. There the plaintiff was indicted for the crime of keeping a bawdy house. The indictment described the particular apartment where it was alleged he kept the bawdy house. The evidence showed that the plaintiff in error owned the premises and received the rental therefor from a woman who used the place for purposes of prostitution. The court held that under the Alaska Penal Code, providing that all persons concerned in the commission of a crime shall be principals and that they should be tried and punished as such, that under this information the plaintiff in error could be convicted on evidence which went to show that he owned the premises and received the rental from a woman who used the place for purposes of prostitution. The fundamental difference between that case and this is that the plaintiff in error was there informed of the particular crime with which he was charged. He was given a description of the particular premises and charged with keeping them for the purpose of prostitution. He therefore had notice that he would be called upon to meet and defend the conduct of the particular premises and his connection therewith. In the instant case, however, the defendant was charged with the possession of liquor at no particular place, and with the sale of it at no particular place. He was charged with possessing liquor himself and selling liquor himself. Neither

by direct allegation nor by inference from other facts alleged was he in anywise apprised of the fact that he would be called upon to answer, not for a sale made by himself, but for sales made by another. He was therefore not "informed of the nature and cause of the accusation." This right, guaranteed to him by the sixth amendment of the Constitution, cannot be taken away by a statute abolishing the distinction between principals and accessories.

In *Davey v. U. S.* 208 Fed 237 (Circuit Court of Appeals, Seventh Circuit), the plaintiff in error was charged in the count with corruptly endeavoring to influence a witness, and in another count with aiding and abetting another person to bribe the same witness. He was found not guilty of the first count and guilty of the second. On page 241 the court said:

> "The principal contention of the plaintiff in error is that the verdict is inconsistent with itself; that Davey was acquitted as principal in a misdemeanor and therefore cannot be found guilty as an accessory because by section 322 the accessory was made a principal.
>
> "At common law there was no such offense as aiding and abetting a misdemeanor. Congress, in section 322, created a new crime and provided in effect that an accessory to an offense against the government should be punished as a principal. The fact that the statute provided that whoever directly commits an offense, and also whoever aids and abets the

> commission of the offense, are both principals and punishable as such does not relieve the government from charging the facts which make up the crime. Two distinct crimes are covered by section 135 and 322. In one the crime is doing something directly; in the other doing the same thing indirectly. It is clear that, in order to convict a man of doing something indirectly he must be so charged, although, if found guilty, his punishment may be that of a principal."

The section of the Criminal Code referred to is 332 rather than 322, and reads as follows:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

The court on page 242 said:

> "Section 322 of the Criminal Code, in declaring that whoever aids, abets, counsels, commands, induces or procures the commission of any act constituting an offense defined in any law of the United States is a principal merely defines the crime of aiding and abetting and provides in effect that one found guilty shall be punished as a principal would be punished."

And again on page 243:

> "The crime of which plaintiff in error was found guilty was defined by section 322; the crime of which he was found not guilty was defined by section 135. The mere fact that the punishment for one who aids and abets is the same as that of a principal or that one who aids and abets may be charged as a principal

does not render the verdict inconsistent, because, in order to hold the accused under section 322, it was necessary for the grand jury to define what law was violated and the manner of that violation.

"Counsel for plaintiff in error say that the accused has been found guilty and not guilty of the same offense. The error in their reasoning lies in the assumption that the crime of doing a thing directly and the crime of aiding and abetting in a violation of the law is the same offense."

In *Hollin v. Commonwealth*, 158 Ky. 427, 165 S. W. 407, the appellant was charged with murder, the charge being against him directly, whereas the evidence showed that he had aided and abetted another person in killing deceased, such other person neither being charged jointly nor mentioned in the indictment. The court held that it was error to instruct the jury that the defendant could be found guilty if he was present and wilfully aided and abetted in the killing.

Mulligan v. Commonwealth, 84 Ky. 229, 1 S. W. 417, was quoted from with approval. There Mulligan had been indicted alone for rape and the trial court had instructed the jury that he was guilty if he aided and abetted others in detaining the woman against her will.

Sustaining the contention that this was error, the Supreme Court of Kentucky said:

" 'The object of the indictment is to make known to the accused with what particular crime he is charged, and that the commonwealth will attempt to prove it as charged. So to indict both the principal and aider and abetter as principals, they are notified that the commonwealth can and will attempt to prove, in order to make out their crime, that one did the principal act and the other aided and abetted, and may prepare their defense accordingly. Or if the commonwealth does not choose to indict the principal in the first degree, or for any reason cannot do so, but wishes to indict the aider, and will set forth in the indictment the name of the principal, together with his acts or participation in the crime, then it can be said that defendant is given a statement of the acts constituting the offense charged against him. On the other hand, to indict him as the only perpetrator of the crime, and then on the trial be permitted to prove that he was not guilty of the crime as charged—the actual perpetrator of it—but that someone else was guilty, not named in the indictment, and thus secure a conviction, would certainly violate the rule.' In concluding the opinion upon this point the court further said: "We conclude, therefore: First, that the commonwealth may, if it chooses, indict both principal and aider and abettor jointly as principals, and secure a conviction against both without violating the rule of the Code *supra*, because they are then furnished with a statement of the facts constituting their crime; or, second, the aider and abettor may be indicted alone; but in that case he ought to be furnished with a statement of the acts constituting the crime. This can only be done by setting out in the indictment the acts of the principal actor. By this course the commonwealth cannot be wronged, and the defendant cannot be taken unawares or by surprise, be-

> cause the commonwealth has informed him by a full statement of the facts of which he is charged.' "

Nearly all of the decisions holding that a defendant can be indicted as a principal and convicted on evidence showing him to be an accessory are in cases where the accessory is charged jointly with the principal, or where the state of facts are such as to carry by necessary inference notice to the defendant of the particular situation which he will be called to meet at the trial. He is given such notice where, as in the Rosencranz case, he is charged with maintaining a particular place or establishment for a particular purpose. He is not given it when he is charged with a particular act such as the sale of an unspecified quantity of liquor with no specifications as to where the sale was made and no statement of the circumstances connected with the sale, and when it is intended to claim upon the trial that he did not actually conduct the sale himself but that he is responsible for the act of another person whose name was known to the District Attorney but not alleged in the information. Especially is this situation violative of the constitutional right of a defendant where, as in this case, the operatives conceal their identity and no arrests are made until a long time subsequent to the time when it is claimed the transaction took place.

No statute abolishing the distinction between a principal and accessory can operate to deprive a defendant of the right to be informed of the nature and cause of the accusation against him. The real inquiry is, in every case, not whether a defendant is informed against in a technical sense as a principal or as an accessory, but whether in the particular case he is given notice by information or indictment of the situation which will confront him upon the trial.

It is respectfully urged that the defendant in this case was given no notice in the information against him that he would be called upon to answer for the acts of Martin. He had every reason to believe that, being charged as the principal and only actor, he would not be called upon to defend as against the acts of another person, and his connection with such other person.

The Court Erred in Instructions as to the Possession by the Bartender Martin. (Specifications of Error V and VII.)

Specification V relates to the following instruction given by the court to the jury and assigned as error:

> "* * * and in this case I instruct you that if you find from the evidence that upon the occasion in question the bartender referred to by the name of Martin was the agent or the

> employee of the defendant Dukich, and that man, with the knowledge of Mr. Dukich, had in his possession at that place the intoxicating liquor in question, that, in law, would amount to the possession of Mr. Dukich."

Specification VI relates to the following instruction given by the court to the jury and assigned as error:

> "If you find from the evidence beyond all reasonable doubt that at the time and on the occasion referred to in the evidence that Martin was the agent or employee of the defendant Dukich, and that upon the time and occasion referred to in the evidence the bartender known as Martin had in his possession intoxicating liquors, that is, liquors suitable for beverage purposes and containing more than one-half of one per centum of alcohol by volume, and that the defendant Dukich knew of the possession of that liquor by his agent or employee, then you should find the defendant guilty of the offense of the possession of intoxicating liquor."

Even if the contention with respect to the admissibility of the evidence showing possession by Martin be not well taken, yet it is obvious that the above quoted instructions do not contain a correct rule of law. The first presents the proposition that if Martin was the agent or employee of the defendant Dukich and with the knowledge of Dukich had in his possession in the place intoxicating liquor, that this would be the possession of Dukich. If this be a correct rule of law, then the employer of a clerk

in a store or office who has in his possession intoxicating liquor in the store or office is guilty from the mere fact of knowledge on his part that the clerk has such liquor in his possession.

But the second quoted instruction goes to an even greater length than the first. There the only thing necessary to fasten guilt upon the employer is that the employer shall have knowledge that his employee had in his possession intoxicating liquor. Whether the liquor was possessed for the uses or purposes of the employer or was authorized or even consented to by the employer is not defined as a necessary element by either instruction.

The Court Erred in Instructing the Jury that Sales of Intoxicating Liquor by the Bartender Martin Would Justify the Conviction of Dukich.

(Specifications of Error VI and VIII.)

Specification VI relates to the following instruction, excepted to by the defendant and assigned as error:

> "* * * In this connection I further instruct you that if you find that at the time and upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender and called Martin, and that the sale of this liquor was made by Martin, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counseled, commanded, induced or procured the bartender known as

> Martin so to sell the liquor, that in law would constitute Mr. Dukich a principal in that transaction and he would be equally guilty with the man Martin who actually carried on and conducted the sale."

Specification VIII relates to the following instruction given by the court to the jury and assigned as error:

> "If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan the intoxicating liquor referred to in the evidence, and that at the time of such transaction the defendant Dukich was present and aided, abetted, counseled, advised or participated in the transaction, your verdict should be guilty."

Not only are these instructions erroneous in charging that the defendant Dukich can be found guilty for the acts of Martin, but they are also erroneous in that they contain assumptions of fact derogatory to the defendant. The first quoted instruction contains the phrase "and that the sale of *this liquor* was made by Martin," and the further phrase "so to sell *the liquor*," and the further phrase "*he would be equally guilty with the man Martin who actually carried on and conducted the sale.*"

The second quoted instruction contains a phrase "and that he sold *or delivered* to Regan *the intoxicating liquor referred to in the evidence.*" Thus it

is assumed in the above quoted instruction that the liquid referred to in the evidence was intoxicating liquor and that Martin was guilty of selling it.

While federal judges may comment upon the evidence and express their opinion upon the same with proper limitations, it has been held that they may not in charging juries assume any necessary element of the defendant's guilt as an established fact, and this has been held even in cases where the evidence against the defendant is clear and uncontradicted.

In *Konda v. The U. S.*, 166 Fed. 91 (Circuit Court of Appeals, Seventh Circuit), the trial court charged the jury as a matter of law that a certain document was non-mailable. On page 93 the court said:

> "In our judgment, however, a defendant in a criminal case has the absolute right to require that the jury decide whether or not the evidence sustains each and every material allegation of the indictment. Material allegations are allegations of fact. And each, as much as any other, enters into a verdict of guilty. If the judge may decide that one or another material allegation is proven, he may decide that all are proven, and so direct a verdict of guilty. In a civil case the judge may exercise the power of directing a verdict for the plaintiff when there is no conflict in the evidence and the only inference that can be drawn by reasonable minds as to the ultimate facts in issue favors the plaintiff. This

power, we opine, grew out of the practical administration of the fundamental power to review, on a motion for a new trial, the findings of the jury. In the civil case above supposed, if the jury should return a verdict for the defendant, the judge would set it aside; and he would continue to set aside verdicts in that case until one should be returned that was in accord with the undisputed facts. So he cuts off the possibility of useless verdicts by directing in the first instance the jury to return the only verdict he will let stand. But in a criminal case, if the jury return a verdict for the defendant the judge, no matter how contrary to the evidence he may think the verdict is, cannot set it aside and order a new trial. Therefore, since the judge is without power to review and overturn a verdict of not guilty, there is no basis on which to claim the power to direct a verdict of guilty. Our conclusion is that an accused person has the same right to have 12 laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting. Inasmuch as jurors are rightly trusted, in close and difficult cases, to maintain the peace and dignity of organized society, surely they may be relied on in the plain and simple ones."

Dolan v. U. S., 123 Fed. 52.

Hicks v. U. S., 14 S. C. R. 144, 37 L. Ed. 1137.

It is respectfully urged that Count 1 of the information was insufficient in the particulars set forth herein; that neither count of the information justified the evidence admitted in support thereof; that

the motion to strike such evidence should have been granted; that the instructions were erroneous, and that the motion in arrest of judgment or the petition for a new trial should be granted.

Respectfully submitted,

E. W. ROBERTSON,

Attorney for Plaintiff in Error.